IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.9.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(NPD) No.966 of 2003

S.Ragavachari .. Petitioner/Complainant.

vs.

1.V.S.Narayanan
Director & Company Secretary
M/s.S & S Industries Enterprises Ltd.
A3, 1st Main Road
Industrial Estate, Ambattur
Chennai.600 058.

2.M/s.Balaji Capital Ltd.
Industrial Consultant
Branch Office: 28, L.B.Road
Adyar,Chennai.600 020
(Given up)

.. Respondents/Opp. Party

Revision Petition filed under Article 227 of the Constitution of India, against the order dated 17.12.2002, passed in O.P.No.788/1999 dt. 25.7.2000 on the file of the District Consumer Disputes Redressal Forum (South), Chennai.

For Petitioner : M/s.G.RM.Palaniappan
For Respondents : Mr.B.Natarajan

ORDER:

This Revision Petition has been filed against the order dated 17.12.2002, passed in O.P.No.788/1999 on the file of the District Consumer Disputes Redressal Forum (South), Chennai.

2. The complainant in O.P.No.788/1999 on the file of the District Consumer Disputes Redressal Forum (South), Chennai, is the revision petitioner.

3. The complainant filed O.P.No.788/1999 for directing the respondents/opposite parties to refund the amount of Rs.15,000/- with interest and compensation and costs. On 25.7.2000 the consumer forum

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directed the respondents/opposite parties to pay an amount of Rs.15,000/- with interest at 18% with a compensation of Rs.5,000/- and with a cost of Rs.500/-. Thereafter the complainant filed an Execution Petition under Sec.27 of the Consumer Protection Act to issue arrest warrant. But the execution petition was returned with an endorsement that already execution petition Nos.96/2000 and 71/2001 were closed as the reference has been registered by BIFR No.358/2000 dated 21.11.2000 and in view of the statutory protection under Sec.22 of Sick Industrial Companies (Special Provision Act), 1985 (hereinafter called SICA), this forum has no jurisdiction and hence the petitioner/decree holder was directed not to file the E.P. hereafter.

4. Aggrieved by the docket order dated 17.12.2002, returning the E.P. without even numbering the same, the above revision petition has been filed under Article 227 of the Constitution of India.

5. Heard both the learned counsel appearing for the petitioner and the respondents. I have also gone through the documents filed and the judgments referred to by them.

6. The learned counsel for the petitioner vehemently contended that the order of the Consumer Forum returning the E.P. is illegal as Sec.22 of SICA will not apply to the execution petition filed under Sec.27 of the Consumer Protection Act, 1986. On the other hand, the learned counsel for the respondents submitted that Sec.22 of the SICA will apply to this case and there is no error or illegality in the order of the consumer court.

7. The learned counsel for the petitioner in support of his contentions relied on the decision of the Hon'ble Supreme Court reported in 2000 (II) CTC 548 (BSI Ltd. v. Gift Holdings Pvt. Ltd.) to contend that the suit envisaged in Section 22(1) of SICA cannot be stretched to include criminal prosecution initiated under Sec.138 of Negotiable Instruments Act,1881. In the above decision, the Hon'ble Supreme Court held as follows:-

> "13. Switching back to sub-section (1) of Section 22 of SICA, we may point out that its operation commence in respect of the companies involved in this batch of appeals only after the expiry of the period of 15 days envisaged in clause (c) of the proviso to Section 138 of the NI Act within which the companies did not pay the amount covered by the cheques. The ban imposed, as per Section 22(1) of the SICA, is against the maintainability of the following legal actions:
> (1)Proceedings for the winding up of the company;
> (2)Proceedings for execution, distress or the likes against any of the properties of the company;
> (3) Proceedings for the appointment of a receiver in respect of such properties;
> (4)Suits for recovery of money or for enforcement of any

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security against the company or guarantee in respect of any loan or advance granted to the company."

"15. The fallacy of the above contention is two-fold. First is that maintainability of a prosecution proceedings is not to be tested on the touchtone of any practical hurdle in enforcing the sentence which might be imposed on a company after conviction. Second is, there is no insurmountable hurdle for recovery of the fine covered by the sentence even from a sick industrial company because the ban contained in Section 22(1) is only conditional as could as discerned from the last limb thereof which reads thus: "Except with the consent of the Board or, as the case may be, the Appellate Authority." It means that with such consent the Court would be in a position to resort to proceedings for distress against the properties of the sick industrial company. Hence the aforesaid contention has no merit at all."

"19. The said contention is also devoid of merits. The word "suit" envisaged in Section 22(1)cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company." As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process."

"20. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. What was considered in Maharashtra Tubes Ltd. (supra) is whether the remedy provided in Section 29 or 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of the SICA. Hence the legal principle adumbrated in the said decision is of no avail to the appellants."

"21. In the above context it is pertinent to point out that Section 138 of NI Act was introduced in 1988 when SICA was already in vogue. Even when the amplitude of

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> the word "company" mentioned in Section 141 of the NI Act was widened through the Explanation added to the Section, Parliament did not think it necessary to exclude companies falling under Section 22 of SICA from the operation thereof. If Parliament intended to exempt sick companies from prosecution proceeding, necessary provision would have been included in Section 141 of the NI Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words ("and no suit for the recovery of money or for enforcement of any security against industrial company or of any guarantee in respect of any loans or advance granted to industrial company"). Parliament did not specifically include prosecution proceedings within the ambit of the said ban."
>
> "22. The conclusion which we have to draw is that if commission of the offence under Section 138 of the NI Act was completed before the commencement of proceedings under Section 22(1) of SICA there is no hurdle in any of the provisions of SICA against the maintainability and prosecution of a criminal complaint duly instituted under Section 142 of the NI Act. The decision rendered by the High Courts, which are assailed before us in this batch of appeals, are therefore not liable to be interfered with. Appeals are accordingly dismissed. Special Leave Petitions heard along with the above appeals are also hence dismissed."

8. From the above, it is very clear that criminal proceedings under Sec.138 of the NI Act, 1881 will not be excluded under Sec.22 of SICA and applying the same provision to the facts of the present case, I will have to necessarily hold that the complaint filed under Sec.27 of the Consumer Protection Act to issue arrest warrant will not be included in the word "suit" as envisaged in section 22(1) of SICA. Therefore the consumer forum has clearly committed an error in returning the E.P. filed by the revision petitioner and thereby it has failed to exercise its jurisdiction conferred on it by the Consumer Protection Act. When the lower court has failed to exercise its jurisdiction on the wrong assumption of law resulting in grave injustice, this court can certainly interfere under Article 227 of the Constitution of India to render justice.

9. Therefore, I set aside the order dated 17.12.2002 and I direct the Consumer Forum to receive the E.P., number the same and pass orders on merits and in accordance with law.

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10. With the above direction, the C.R.P. is allowed. No costs. C.M.P.No.10022/2003 is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sks

To
The President, District Consumer Disputes Redressal Forum,
Chennai (South).
+ 1 CC To Mr. GRM.Palaniappan, Advocate SR NO.46522

+ 1 CC To Mr. B.Natarajan, Advocate SR NO.45801

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